

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.04.2007

CORAM

THE HONOURABLE MR.JUSTICE DHARMA RAO ELIPE
AND

THE HONOURABLE MR.JUSTICE S. PALANIVELU

Writ Appeal Nos. 3290 & 3454 of 2004

W.A. No. 3290 of 2004

1. Brigadier Chaitanya Prakash
2. Hindustan Photo Films Manufacturing Co., Ltd., rep. by its Chairman cum Managing Director,
Udhagamandalam - 643 005.
Tamil Nadu. ...Appellants

Vs.

Sri.H. Omkarappa ...Respondent

Prayer: Writ Appeal filed under Clause 15 of the Letters patent against the order this court dated 11.8.2004 in W.P. No. 19169 of 1999. This Petition presented to this court under Article 226 of the Constitution of India to issue a writ of certiorari, calling for the records of the respondents in connection with order bearing Ref No.P1/4/5348/HRD dated 29.11.99 of the 2nd respondent and quash the same.

For Appellants :: Mr.A.L. Somayaji, Senior Counsel for
M/s. Aiyar & Dolia

For Respondent :: Mr.V. Prakash, Senior Counsel for
Mr. P. Chandrasekar,

W.A. No. 3454 of 2004

H. Omkarappa

..Appellant

Vs.

1. Public Enterprises Selection Board
rep. by its Secretary,
Public Enterprises Bhavan,
C.G.O. Complex, Block No.14,
5th Floor, Lodhi Road,
New Delhi : 110 003.

2. Spices Trading Corporation Ltd.,
rep. by its Chairman,
Jawahar Vyapar Bhavan,
No.1, Tolstoy Marg,
New Delhi - 110 001.

3. Brigadier Chaitanya Prakash

4. M.C. Ponanna

..Respondents

Prayer: Writ Appeal filed under Clause 15 of the Letters patent against the order this court dated 11.8.2004 in W.P. No. 9842 of 2000 to issue writ of Declaration Declaring the exclusion of the petitioner from the selection process for the post the post of Managing Director of M/s. Spices Trading Corporation Limited and the consequent Selection of the Fourth respondent for the Said post as illegal and void and violative of the petitioners rights under Article 14 and 16 of the constitution of India, and Consequently direct the first and 2nd respondent to hold a fresh selection for the post of Managing Director of the 2nd respondent Corporation Considering the petitioner's candidature also and issue such further or other orders.

For Appellant :: Mr.V.Prakash, Senior Counsel for
M/s.P.Chandrasekaran
S. Dhiraviyaraj

For Respondents :: Mrs.Radha Gopalan for R1
Mr.Kumaresan for
M/s. Ramasubramaniam Associates for R2
Mr.R. Jayaprakash for R4

J U D G M E N T

(Judgment of the Court was delivered by Dharma Rao Elipe,J.)

Writ Appeal No.3290 of 2004 is directed against the order dated 11.8.2004 of the learned Single Judge allowing W.P. No. 19169 of 1999 which was filed for a Writ of Certiorari to quash the order dated 29.11.1999 terminating the probationary services of the petitioner therein/respondent herein. Writ Appeal No. 9842 of 2000 is filed challenging the order passed in W.P. No. 9842/2000 dated 11.8.2004. (The parties shall be referred in the judgment in the same rank as they are arrayed in W.A. No. 3290/2004)

2. The respondent in W.A. No. 3290 of 2004 was appointed on 3.6.98 as Executive Director (Marketing) and he had to undergo probation for a period of one year. The said period was extended on 30th September, 1999 for a period of 3 months on the ground that his performance was unsatisfactory. Thereafter, the matter was placed before the Board of Directors with the Personal Appraisal Report of the 1st appellant and the Board of Directors, after consideration of the overall performance of the respondent, on the basis of the Personal Appraisal Report, decided to dismiss the respondent from service for unsatisfactory performance and by order dated 29.11.1999, the respondent was terminated from service, which was the subject matter of challenge in the writ petition. The learned Single Judge, after going through the materials placed on record and after considering the submissions made by the learned counsel on either side, allowed W.P. No. 19169 of 1999 as against which, as already stated, W.A. No. 3290 of 2004 has been filed.

3. According to the learned senior counsel appearing for the appellants, the finding of the learned Single Judge that the order of termination is stigmatic and as it was not preceded by any enquiry, it is liable to be set aside is not correct. The order of termination was issued after it was found that the performance of the respondent during his extended period of probation was found not to be satisfactory. The learned senior counsel submitted that Rule 3 of the HPF Service Rules contemplates termination of service on the ground of unsatisfactory performance during the period of probation. Further, it is contended by the learned senior counsel that the decision to terminate the service of the respondent was taken by the Board of Directors of the appellant after assessing the performance during the period of probation and the decision taken

was uninfluenced by the remarks of the Managing Director of the Appellant Company. It is also submitted by the learned senior counsel that the order of termination is not punitive in nature. In support of his contentions, the learned senior counsel relied on the following judgments:

(i) 2006 (7) Supreme 159 (Om Prakash Mann V. Director of Education (Basic) & Others) wherein the Supreme Court observed as hereunder:

"8. By now, it is well settled principle of law that the doctrines of principle of natural justice are not embodied Rule. It cannot be applied in the straight jacket formula. To sustain the complaint of violation of the principles of natural justice, one must establish that he has been prejudiced by non-observance of principle of natural justice....."

9. Admittedly, the enquiry was also initiated against the appellant when he was on probation. It is well settled principle of law that if the probationer is dismissed/terminated during the period of probation, no opportunity is required to be given and therefore, the question of violation of principles of natural justice does not arise in the given facts of the case."

(ii) (2006) 4 SCC 469 (Abhijit Gupta V. S.N.B. National Centre, Basic Sciences) wherein the following paragraphs are relevant:

"13. In the case of the appellant before us, the record in uncertain terms makes it clear that every time the appellant's attention was drawn to his deficiencies and he was repeatedly advised to improve his behaviour, conduct and discharge of work. True, that in some of the letters there was intemperate language used (the appellant was also equally guilty of doing that). Notwithstanding the intemperate language, we are unable to accept the contention of the appellant's counsel that the letter dated 7.4.1998 indicates that the appellant was being charged with the misconduct and, therefore, being removed from service. Read as a whole, the letter gives the impression that the removal of the appellant from service was only because the respondents, after giving a long rope to the appellant, had come to the conclusion that the appellant's service was unsatisfactory and there was no hope of his improvement."

..15. The learned counsel for the appellant, however, strongly contends that the "stigma" cast on the employee may not be confined to his personal character but may also affect his capacity to work. The test, learned counsel for the appellant submitted, is that, if what is stated in the order of termination is read by a future employer, it prejudices the future

employment of the employee. In the face of the law laid down in the judgment just referred, we are unable to accept this as the correct test.

....17. The High Court has carefully considered all the circumstances placed before it and arrived at the conclusion that the respondent's work was under observation during the probationary period and that he was given repeated opportunities to improve his performance for which purpose his probation was extended from time to time. The fact that the authority did not find him fit for confirmation was also brought to his notice several times and yet he was given opportunities for improving by extending his probationary service.....Finally, as this Court pointed out in P.N. Verma case, a termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, does not ipso facto, become stigmatic."

(iii) (2005) 7 SCC 447 (Rajasthan SRTC V. Zakir Hussain) wherein the Supreme Court made the following observations:

"26. In State of U.P. V. Kaushal Kishore Shukla, this Court has observed in para 6 as under:

.....Under the service jurisprudence, a temporary employee has not right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination.

.....34.....As already noticed, the services of the respondent were terminated simpliciter and does not contain any stigma and, therefore, there was no requirement under the law to hold any enquiry before terminating the services. The Courts below have committed serious error in granting backwages along with reinstatement. Even otherwise, the respondent has not led any evidence before the trial Court except his own ipse dixit to show that his services were terminated on the ground of any alleged misconduct. Therefore, it was not obligatory on the part of the Corporation to hold an enquiry before terminating the services. It is also settled that the employees of the Corporation are not civil servants and, therefore, they are not entitled to protection under Article 311 of the Constitution. Their terms of appointment are

governed by the letter of appointment and, therefore, the management was well within its right to terminate the services of the respondent probationer during the period of probation if his services were not found to be satisfactory during the said period..."

(iv) (2005) 1 SCC 132 (Registrar, High Court of Gujarat V. C.G. Sharma) wherein it has been held as follows:

"43. But the facts and circumstances in the case on hand are entirely different and the administrative side of the High Court and the Full Court were right in taking the decision to terminate the services of the respondent, rightly so, on the basis of the records placed before them. We are also satisfied, after perusing the confidential reports and other relevant vigilance files, etc. that the respondent is not entitled to continue as a judicial officer. The order of termination is termination simpliciter and not punitive in nature and therefore, no opportunity needs to be given to the respondent herein. Since the overall performance of the respondent was found to be unsatisfactory by the High Court during the period of probation, it was decided by the High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simpliciter cannot be said to be violative of Articles 14, 16 and 311 of the Constitution. The law on the point is crystallised that the probationer remains a probationer unless he has been confirmed on the basis of the work evaluation....."

(v) 2005 (1) Supreme 818 (Municipal Committee, Sirsa V. Munshi Ram) wherein the Supreme Court has referred to the judgment reported in (2001) 3 SCC 117 (H.F. Sangati V. Registrar General, High Court of Karnataka & Ors):

"11. In H.F. Sangati Vs. Registrar General, High Court of Karnataka & Ors. {(2001) 3 SCC 117}, this Court while considering the discharge of a probationary Munsif held:

"The impugned order does not cast any stigma on the appellants. All that has been said in the impugned order is that the appellants were unsuitable to hold the post of Munsif. The impugned order of discharge has been passed in strict compliance with the requirements of rule 6. It does not cast any stigma on the appellants nor is it punitive. There was thus, no requirement to comply with the principles of natural justice, much less to hold any formal proceedings of inquiry before making the order."

Reliance was also placed on the judgments reported in 1995 Supp (3) SCC 364 (Jai Kishan V. Commissioner of Police and another) and AIR 2002 SC 23 (Pavanendra Narayan Verma V. Sanjay Gandhi P.G.I of Medical Sciences).

4. Per contra, according to the learned senior counsel for the respondent, the termination was not a simpliciter termination, but highly stigmatic. The learned counsel would also submit that the respondent was not given proper treatment or facilities, which were normally available to the post in which he was working. The learned senior counsel would submit that because of the termination of the service of the respondent before completion of his probation, he has been deprived of the prospects of getting employment in M/s. Spices Trading Corporation Limited. It is also alleged that the refusal of the respondent to oblige the 1st appellant in his efforts to extend certain monetary benefits to M/s. Phil Corporation, a third party, which had been awarded a contract to do all the private sector marketing of the appellant Corporation, inspite of monetary default on its part, is also one of the reasons for the adverse remarks made against the respondent by the 1st appellant in his report. Hence, he would submit that the order of termination is vitiated by mala fides and it is per se illegal.

5. Heard the learned senior counsel on either side. Perused the materials on record. Admittedly, the order of termination was passed on the ground of unsatisfactory performance of the respondent. Though the order was passed by the Chairman-cum-Managing Director, a reading of the said order shows that the decision to terminate the services of the respondent was actually taken by the Board of Directors and it is also stated in the said order that the Management was not satisfied with the overall performance of the work by the employee. It is also apparent from the materials on record that there was personal friction between the 1st appellant and the respondent. Though the decision to terminate the respondent from service was taken by the Board of Directors, the Board of Directors had relied upon and have been fully guided by the Performance Assessment Report prepared by the Chairman-cum-Managing Director to arrive at the said decision. As could be seen from the order of the learned Single Judge, the materials relied on by the Board of Directors are :

- (i) The letter of the Chairman-cum-Managing Director dated 4.11.1999;
- (ii) Response by the respondent dated 13.11.1999;
- (iii) Performance Assessment Report (P.A.R.) by Chairman-cum-Managing Director dated 26.11.1999 and the annexures thereon.

The first is the letter of the Chairman-cum-Managing Director dated 4.11.1999 which is a confidential letter to the respondent containing the review of his performance during the probation

period. The alleged defective performance in his work is reflected in the said letter. In response to the said letter, the respondent had written a letter dated 13.11.1999 denying the allegation of non-performance and he had also stated that from the beginning, he was restrained from performing with his full capacity by the Chairman-cum-Managing Director and had enlisted several details, which, according to him, were purposeful harassment to demoralise him. Pursuant to this reply, the P.A.R. dated 26.11.1999 was prepared by the Chairman-cum-Managing Director, which report has been instrumental in passing the order of termination by the Board of Directors and some of the remarks contained in the P.A.R, as extracted in the order of the learned Single Judge are as hereunder:

"14.....

(I) In the report, it is stated that the petitioner (respondent herein) was given enough counselling about his drawbacks. It is however, denied by the petitioner and in Page 2 of the report, it is stated that the weaknesses and shortcomings of the petitioner were communicated to him orally.

(II) Paragraph II(b) dealing with "pace of work" contains as many as 28 references of various commissions and omissions alleged as against the petitioner and recording the same in the minutes of the meetings of the Head of the Department. But, it is not stated clearly as to whether the same had been communicated to the petitioner or not.

(III) While dealing with the personal conduct, in paragraph (III), it is stated that the petitioner was making totally baseless allegations against his superiors, instigating other persons to write to external agencies, making malicious statements which are defamatory. He was also accustomed to throw threats on the colleagues and officers and also used abusive language. He is also accused of furnishing wrong figures misguiding the C.M.D. and the Director of Finance, and as such, lacks qualities of working as a member of a cohesive team.

(IV) While dealing with "Honesty/Integrity", it is stated that he had made malicious and disparaging statements against the C.M.D and Director of Finance. His complaints against the C.M.D. are analysed and concluded that such statements are proved to be false. His action and complaints are stated to be highly perverse in nature. His complaints are also stated to be far from truth and that his action actually deserves disciplinary action in the normal course.

(V) At page 10, there are further allegations dealing with his objections for having stripped of his

responsibilities as the head of the Security Department. It is stated tht the petitioner, while functioning as the head of the Security Brnach, is alleged to have acted with highhandedness and ruthlessly harassing his subordinate officers and that he was in the habit of utilising the security guards for his personal works and that his authoritarian behaviour has led to unhappiness among his subordinate officers.

(VI) He had made an unreasonable financial claim of Rs.70,000/- towards transportation without any material. The said conduct amounts to financial impropriety.

(VII) The claim of arbitrary charges in his official tour to Chickmagalore is stated to reflect his questionable integrity.

(VIII) Under Part IV, "Loyalty", it is stated that he had become perennially disloyal to the company throughout his period of probation.

(IX) Under Part VII dealing with personal conduct, it is stated that he had made several allegations against the C.M.D which were totally baselss and bereft of truth. After stating so, it is further recorded that the observations which are to follow are not connected with the assessment of his performance, but "intended to answer his allegations with a view to erase the misgivings he has developed in him:. This is followed by a detailed analysis of the contentions raised by the petitioner and the reply/comments by the C.M.D."

The remarks made by the Chairman-cum-Managing Director as regards the overall performance of the respondent are grave and stigmatic. When the Board of Directors had taken a decision based on such remarks by the Chairman-cum-Managing Director, the contention of the learned senior counsel that termination is a termination simpliciter cannot be accepted and it is undoubtedly punitive in nature. Further, the respondent should have been subjected to an enquiry before terminating his services, as rightly observed by the learned Single Judge.

6. Further, the respondent, after his termination, had applied for the post of Managing Director of M/s. Spices Trading Corporation Limited, a subsidiary of State Trading Corporation Ltd., pursuant to a circular issued by the Public Enterprises Selection Board and by telegram dated 25.2.2000 issued by the Secretary of Public Enterprises Selection Board, the respondent was called upon to attend an interview for the said post on 16.3.2000 at 3.30p.m.. However, when he reached the venue of interview, he was informed by the Secretary of Public Enterprises Selection Board that he need not attend the interview and he was

also given to understand that the decision to exclude him from the interview was pursuant to the letter of the Deputy General Manager, (Human Resources Development), Hindustan Photo Films Limited, Ooty bearing No.P.1/2000 dated 29.2.2000 issued at the behest of the 1st appellant herein, which according to the respondent, shows the vindictive attitude of the 1st appellant herein. This is not a baseless allegation made by the respondent against the 1st appellant and we find corroboration from the counter affidavit filed by the Public Enterprises Selection Board in W.P. No. 9842 of 2000 wherein it is stated that the name of the respondent was deleted from the list candidates called for interview on the basis of the confidential information received from Messrs. Hindustan Photo Films Corporation Ltd that the respondent was removed from the services of the Corporation on the ground of unsatisfactory performance.

7. Inasmuch as the respondent has not been considered by the Spices Trading Corporation Limited for appointment in view of the order of termination passed on the ground of unsatisfactory performance by M/s. Hindustan Photo Films Corporation Limited, as rightly observed by the learned Single Judge, the termination order has proved stigmatic and the respondent should have been given an opportunity and the Board of Directors, being an independent body, should not have blindly accepted the P.A.R of the Chairman-cum-Managing Director and should have dealt with the matter in detail. We are in entire agreement with the reasons given by the learned Single Judge in interfering with the order of termination and allowing W.P. No. 19169/1999. Accordingly, W.A. No. 3290/2004 is dismissed. In view of the dismissal of W.A. No. 3290/2004, no orders are necessary in W.A. No. 3454/2004. The respondent shall be allowed to continue his service in the appellant Corporation and orders to that effect shall be passed within 4 weeks from the date of receipt of a copy of this order.

nv

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Sd/
Asst.Registrar

/true copy/

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Sub Asst.Registrar

To

1. The Secretary,
Public Enterprises Selection Board
Public Enterprises Bhavan,
C.G.O. Complex, Block No.14,
5th Floor, Lodhi Road,
New Delhi.

2. The Chairman cum Managing Director,
Hindustan Photo Films Co Ltd.,
Udhagamandalam
Tamil Nadu.

3. The Chairman,
Spices Trading Corporation Ltd.,
Jawahar Vyapar Bhavan,
No.1, Tolstoy Marg,
New Delhi - 110 001.

+ 2 ccs to M/s. Aiyar and Dolia, Advocate SR No. 23360

+ 1 cc to Mr. P. Chandrasekaran, Advocate SR No.23792

+ 1 cc to Mr. P. Chandra Sekar, Advocate SR No. 23791

W.A. Nos. 3290 & 3454 of 2004

MBS (CO)
SR/27.4.2007

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